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ABSTRACT

The illegal Mexican migration to the U.S. has resulted in judicial and statutory responses that have constrained the constitutional and civil rights of Chicanos. The Supreme Court, in its concern for stopping the flow of illegal immigrants, has ruled in U.S. v. Martinez-Fuerte that it is not a constitutional violation to refer motorists to a secondary inspection location at a permanent border patrol checkpoint even if such referral is based largely on a Mexican appearance or lacks any reasonable suspicion. The discriminatory effect of such a policy will fall upon the Chicano. The Carter plan to add border patrolmen and reorganize the border patrol's resources for greater effectiveness will only multiply the discriminatory incidents if the inspection policy is unchanged. The Carter plan should provide a change in the inspection policy which will accord Chicanos the same rights to unfettered passage that is accorded to other non-Mexican looking citizens. Likewise, the Carter plan which involves sanctions against employers who engage in a pattern or practice of hiring illegal aliens is unbalanced in that it is inadequate in its protection against employment discrimination surely to be suffered by Chicanos and legal Mexican aliens. The Carter plan should include specific statutory protection for Chicanos and legal Mexican aliens against employment discrimination by all employers. Such statutory protection should include authorization for the recovery of attorney's fees for plaintiffs seeking the law's protection. (Author/NQ)

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THE CHICANO/ILLEGAL-ALIEN CIVIL LIBERTIES INTERFACE

by

Arturo Gándara *

I. INTRODUCTION

Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. Now fine and just actions, which political science investigates, admit of much variety and fluctuation of opinion, so that they may be thought to exist only by convention, and not by nature...We must be content, then, in speaking of such subjects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premises of the same kind to reach conclusions that are no better...In the same spirit, therefore, should each type of statement be *received*; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits....

--Aristotle, Nicomachean Ethics

The illegal Mexican migration to the United States has, at various times, been called an "invasion" and a "brown tide." Assisted by the media's penchant for sensationalism, newspaper articles, magazine articles, and television coverage have raised concerns about the illegal alien to xenophobic levels similar to those preceding the national campaigns against illegal aliens in the 1930s and 1950s (Operation Deportation and Operation Wetback).

However, the most apropos description of this Mexican migration to the United States was provided recently by a writer for *Forbes* who

* Presented at the 1977 Joint National Meeting of the Latin American Studies Association and the African Studies Association in Houston, Texas, November 5, 1977.

likened it to sex in Victorian times, "...something nearly everybody deplores and nearly everybody acquiesces in."¹ He termed it the "dirty little secret" that is the nation's indulgence. In this simile the writer captured the public condemnation and private exploitation of the illegal alien that results in an inconsistent and at times hypocritical public policy.

The illegal alien, however, is not the sole recipient of the national policies or sentiments directed against him. Americans of Mexican ancestry,^{*} a preponderance of which are Americans by birthright, also suffer the indignities and humiliations visited upon the illegal alien as a result of governmental policy and public prejudices. This is largely due to the fact that the cultural, linguistic and racial facets of the two groups overlap to varying degrees and that to the Anglo community, a major intervening variable in the destinies of these two groups, a differentiation is difficult or generally irrelevant.

A critical differentiation, however, is the legal status accorded to the Chicano, a citizen, and the illegal alien. This paper proposes to examine how the concern over illegal Mexican migration and the more limited legal rights accorded the illegal alien affect the legal rights and civil liberties of Chicanos.

Most everyone who has familiarity with this topic has probably heard, at one time or another, of an example of such civil liberties limitations or violations. The next tempting question for the scholar then becomes, "How widespread is this or is it an isolated incident?" That is, the contemporary research scheme is to gather empirical data on the issue. While such an effort is needed, this is not it. But to quote Garret Hardin, "Data generation...serves both good and bad ends. Whenever we are in trouble we are apt to call in the computers to spew out rolls of computer sheets much as an octopus pours forth a cloud of ink to hide its panic...Thus do we act when we are troubled:

^{*} Henceforth to be called "Chicanos" although it is recognized that many Americans of Mexican ancestry prefer to be called any of the following: American, Mexican-American, Mexican American, Spanish, Spanish-speaking, Spanish-surnamed, Hispanic, or mexicano.

we multiply data instead of looking for insights."² By contrast, my purpose here is to present absolutely no data but instead look for the primary insights that the Chicano/Illegal-Alien civil liberties interface has to offer.

II. PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

--U.S. CONST. Amend. IV

Chicanos, illegal aliens, and the border patrol form a triad whose daily interaction brings into force the protection offered by the fourth amendment's prohibition on unreasonable searches and seizures. This occurs when the border patrol attempts to fulfill part of its mission by searching, seizing, and deporting illegal aliens. Since illegal aliens live, work, play, and hide amidst the Chicano community, these activities impact on the Chicano. In addition, since the border patrol's activities are concentrated in areas that are heavily populated or traveled by Chicanos, Chicanos and the border patrol encounter each other fairly often, particularly on the highways.

These encounters usually involve border patrol inspections of a vehicle and/or its occupants. These inspections are made under statutory authority granted by the Immigration and Naturalization Act which states that:

- (a) Any officer or employee of the service authorized under regulations prescribed by the Attorney-General shall have power without warrant--
 - (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States.
 - (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of laws regulating the admission, exclusion, or expulsion of aliens or to arrest any alien in the United States if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest...

- (3) Within a reasonable distance from any external boundary of the United States to board and search for aliens any...vehicle...³

The inspections may occur at permanent checkpoints, temporary checkpoints, or wherever a roving border patrol may be operating. The Supreme Court has considered inspections at any of the preceding locations as "searches" and has considered the stopping of a vehicle for inspection by the border patrol a "seizure." Therefore, such "searches" and "seizures" must be conducted in accordance with the protections afforded by the fourth amendment.

Thus, we see obvious tension developing between the fourth amendment and the statutory authority granted an INS officer to "interrogate any alien or person believed to be an alien." Since belief is rather subjective, the probability is high that a Chicano will be "believed to be an alien." Thus the exercise of this statutory authority by an INS officer will act to limit the civil liberties of Chicanos although the intended targets are aliens. On the other hand, note that the fourth amendment does not limit its protection to citizens but extends it to "persons." Thus aliens, as well as Chicanos, may be accorded fourth amendment protections which limit the exercise of the INS statutory authority. An examination of how this tension has been balanced by the courts provides valuable insight into the Chicano/Illegal-Alien interface.

We shall also see that the most recent "balancing" by the Supreme Court limits the Chicano's fourth amendment rights in order to pursue the apprehension of illegal aliens. Such a fourth amendment limitation will be imposed upon Chicanos because it is based upon their Mexican appearance. Anglo citizens who do not have a Mexican appearance and Anglo-looking Chicanos need not fear any similar limitation on their fourth amendment right against unreasonable searches and seizures, unless they happen to be riding with a Chicano that has a Mexican appearance.

It only took five court decisions to reach this state of affairs so the decisions can be reviewed rather quickly. In *Au Yi Lau v. Immigration and Naturalization Service*⁴ the D.C. Court of Appeals held

that immigration officers, in accordance with 8 U.S.C. §1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. The aliens in this particular case were illegal and fled at the approach of the INS officers, thus creating a reasonable suspicion that they were illegal which justified a forcible temporary detention. For our purposes, the important part of the decision was that in requiring reasonable suspicion the court recognized the aliens' right to fourth amendment protection. Since the court did not distinguish between legals and illegals and the case in point involved illegals, it can be concluded that the court believed the fourth amendment protection against unreasonable searches and seizures applies to illegal aliens. It should be noted, however, that the Supreme Court denied certiorari. Thus, the Court of Appeals decision stands without a ruling from the Supreme Court.

In the following cases, the Border Patrol Tetralogy, the Supreme Court did rule but in all cases illegal aliens were not involved as defendants so the Court did not have to reach the issue of whether the fourth amendment protection applies to illegal aliens. The illegal aliens were usually deported without further prosecution in return for testimony against citizens or resident aliens. The Court did recognize, however, that the fourth amendment protection extends to aliens without distinguishing between legals and illegals. It, therefore, seems that should the particular circumstance arise in which the Supreme Court has to rule on the issue directly and unequivocally, the illegal alien will be found to be protected by the fourth amendment.

In *Almeida-Sanchez v. United States*⁵ the defendant, a Mexican citizen with a valid U.S. work permit was convicted of receiving, concealing, and transporting illegally imported marijuana. He was apprehended 25 miles north of the border by a roving border patrol operating under the authorization of 8 U.S.C. §1357(a)(3)(1970) which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States" as authorized by regulations promulgated by the Attorney General. The

regulations define "reasonable distance" as "within 100 air miles from any external boundary of the U.S."⁶ The Court reversed the conviction holding that, "Automobile or no automobile there must be probable cause for the search." In requiring probable cause the Court saved the constitutionality of 8 U.S.C. §1357(a)(3).

In *United States v. Ortiz*⁷ the defendant was convicted of knowingly transporting illegal aliens, a violation of 8 U.S.C. §1324(a)(2)(1970). In contrast to *Almeida-Sanchez*, this case involved a permanent checkpoint rather than a roving border patrol. Nevertheless, the Court, in reversing the conviction, affirmed *Almeida-Sanchez* holding that the fourth amendment forbade border patrol officers, in the absence of consent or probable cause, to search private vehicles at traffic checkpoints removed from the border and its functional equivalents, and for this purpose there is no difference between a checkpoint and a roving patrol.

Thus far, the Court seemed to be interpreting the fourth amendment in such a way that favored the civil liberties of Chicanos. After years of suffering inspections that many Chicanos considered embarrassing, humiliating, and that involved a loss of dignity and respect, the Court was finally ruling out searches and seizures that Chicanos felt unfairly focused on them. Chicanos have long felt that immigration officers far too often stopped and searched Chicanos not on a probable cause basis but because they looked Mexican. Looking Mexican should not be any less probative of American citizenship than looking Anglo. Yet Chicanos slowly burned when the Anglo-looking occupants of the cars ahead of them and behind them were waved on while Chicanos were stopped and interrogated about their citizenship. At the same time they received the unsubtle message that, "You don't look like an American citizen." As the Court rightly recognized in *Ortiz*, "Where only a few are singled out for a search, as at San Clemente, motorists may find the searches especially offensive."

Thus, *United States v. Brignoni-Ponce*⁸ was especially significant to the Chicano community. In this case a roving border patrol stopped a car solely on the grounds that the occupants appeared to be of Mexican descent. Of three occupants two were illegal aliens and the third a U.S. citizen who was subsequently convicted of knowingly transporting

illegal aliens. The Supreme Court held that the fourth amendment did not allow a roving border patrol to stop a vehicle near the Mexican border and question its occupants about their citizenship and immigration status when the only ground for suspicion is that the occupants appear to be of Mexican ancestry. In reversing the conviction, the Court stated that, "Assuming that Congress has the power to admit aliens on the condition that they submit to reasonable questioning about their right to be in the country, such power cannot diminish the fourth amendment rights of citizens who may be mistaken for aliens."

The Court further held, that except at the border and its functional equivalents, patrolling officers may stop vehicles only if they are aware of specific articulable facts, together with rational inferences therefrom, reasonably warranting suspicion that the vehicles contain aliens who may be illegally in the country. The Court enumerated some articulable facts but did not limit them to its list. For example, it included characteristics of the area, proximity to the border, usual patterns of traffic, previous experience with alien traffic, information about illegal crossings, erratic driving behavior or attempt to evade, aspects of the vehicle such as whether it is loaded down, number of passengers, persons trying to hide, appearance, inability to speak English and response to officer's questions.

Again this decision favored the civil liberties of the Chicano. At long last looking Mexican was not sufficient to justify a roving border patrol stop. In this narrow legal area, Chicanos could no longer be stigmatized for looking like their parents or grandparents. Likewise, Mexicans could no longer be subjected to a different standard than other aliens just because they looked different. However, this decision also contained a retreat from the probable cause standard of *Almeida-Sanchez* since it allowed a roving border patrol stop on the lesser standard of specific articulable facts producing rational inferences which result in a reasonable suspicion.

Nevertheless, the last of these cases, *United States v. Martinez-Fuerte*,⁹ in which defendants in the cases consolidated included a resident alien and a Chicano, was totally unexpected, and seemed inconsistent with the trend of the preceding cases. The Supreme Court held

that it was constitutional for the border patrol after routinely stopping or slowing automobiles at a permanent checkpoint, to refer motorists selectively to a secondary inspection area, for questions about citizenship and immigration status, on the basis of criteria that would not sustain a roving patrol stop, and that there was no constitutional violation even if such referrals were made largely on the basis of apparent Mexican ancestry. In its decision the Court exhibited a great concern for the problem of illegal alien migration to the United States. In balancing the governmental interests against the fourth amendment, the Court found that referral to a secondary inspection area for questioning was a justifiable minimal intrusion, even if referrals were made largely on the basis of apparent Mexican ancestry. Justices Brennan and Marshall dissented and quite pointedly inquired of the majority on what actual experience they based their conclusion that referrals "should not be frightening or offensive because of their public and relatively routine nature." At the same time they voiced concern that the, "...process will then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country..." and expressed that, for law in this country to "...tolerate use of one's ancestry as probative of possible criminal conduct is repugnant under any circumstances." They also recognized the potential for embarrassment and humiliation of Chicanos and that corresponding resentment was sure to accrue.

Thus, in this area of fourth amendment protection the illegal alien migration has resulted in a limitation of the Chicano's civil liberties simply because he and the illegal alien may be thought to look alike. The outcome of the *Martinez-Fuerte* decision is critically linked with the issue of illegal aliens. But for increasing numbers of illegal aliens it is doubtful that the Court would have seen the problem in the light that it did which required it, in its view, to prefer the government's interest to that of citizens of Mexican ancestry.

The Carter amnesty proposal also includes plans to increase enforcement resources at the border and plans to reorganize resources to ensure greater effectiveness. In addition it plans an addition of a minimum of 2000 additional enforcement personnel at the border. To Chicanos

the increase of resources and personnel seem to guarantee a multiplication of the violations against their constitutional and civil rights if practices such as those approved in *Martinez-Fuerte* are continued or if they are made more "effective" by exploiting the opening left in *Martinez-Fuerte* of referring motorists to secondary inspection areas on no sounder basis than their appearing to be of Mexican ancestry.

While the Court may have concluded that there was no constitutional violation of the fourth amendment it does seem that the border patrol practice of *Martinez-Fuerte* is a violation of equal protection as applied to the federal government through the due process clause of the fifth amendment¹⁰ or a violation of §1981 of the Civil Rights Act of 1866.¹¹ More border patrol personnel and more "effective" enforcement may, in fact, trigger an early challenge to *Martinez-Fuerte* that will assert the Chicano's right to be treated in a constitutionally valid manner and with equality to his Anglo neighbor. At the same time the due process clause of the fifth and fourteenth amendments and §1981 protect "persons" so the Chicano's assertion of his constitutional and civil rights will undoubtedly benefit his other neighbors, legal and illegal aliens.

III. PROTECTION AGAINST EMPLOYMENT DISCRIMINATION

It shall be an unlawful employment practice for an employer--

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individuals's race, color, religion, sex, or national origin.

--42 U.S.C. §2000e-2(a)(1970),
Civil Rights Act of 1964

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

--42 U.S.C. §1981(1970), Civil Rights Act of 1866

A principal component of the Carter Amnesty plan is that the hiring of illegal aliens will be made unlawful. The Justice Department will be responsible for enforcement against those employers who engage in a "pattern or practice" of such hiring. Penalties would be civil, injunctions and fines of \$1000 per illegal alien hired. Criminal penalties could be imposed by the courts against employers violating injunctions.

The concern of Chicanos is that these sanctions would deter employers from hiring not only illegal aliens but Chicanos as well. This could occur for several reasons. One reason could be that it will become a financial and legal risk for the employer despite the precautions that he might take. Another reason could be that it just becomes a burdensome task to determine who is legal or not. Another reason might be that the employer who would have preferred not to hire Chicanos now has an excuse not to do so.

Regardless of the reason the predictable job discrimination is unacceptable to Chicanos. Unemployment in the Chicano community is high. It cannot afford to have jobs refused to it because it will only compound

the problems of poor health, poor education, poor housing, and poor expectations. As it is many Chicanos have difficulties obtaining a job because of limited job skills, limited education, in some cases limited English language facility. Now, in addition to those problems he has to convince a prospective employer that he is not an illegal alien. Some would say that life is unfair but if it is not seen as a duty of government to alleviate that unfairness then the least good government could do is refrain from heaping more on those least able to bear it.

The Carter plan purports to recognize this potential problem but the manner in which it is addressed, full enforcement of existing anti-discrimination laws by federal civil rights agencies, seems blind to the reality of the ineffectiveness of those same agencies. But all that aside there is still something offensive about a plan that makes a potential employer a de facto border patrolman. In effect the border has been moved to the employer's doorstep. A Chicano could have avoided the embarrassment, humiliation, loss of dignity and respect that he might be made to suffer when interrogated about his right to be in his country by avoiding border patrol inspections, if possible, or at least minimizing those encounters. But now, he is to receive that same interrogation from his prospective employer and the burden is his to show he has a right to live in his country and concomitantly the right to work.

But assuming that the Carter plan will be implemented it behooves us to examine how the federal civil rights statutes affect the Chicano's and the alien's rights. Title VII of The Civil Rights Act of 1964 prohibits private discrimination in employment on the basis of national origin. Since Chicanos have been recognized as an identifiable class and national origin group for purposes of the equal protection clause,¹² there is no doubt that Chicanos fall under the national original protections offered by the Civil Rights Act of 1964.

Yet the protection offered is less than complete. As originally enacted, the 1964 Act excluded employers of 25 or fewer employees from its purview. Members of Congress estimated that this would exclude from coverage 92 percent of all employers and 60 percent of all employees in

the United States.¹³ Although the 1972 amendments to the Civil Rights Act of 1964 extended the Act to reach employers of 15 or more employees a substantial number of employers and employees remain uncovered. For example for the year 1974 there were 3,612,609 firms with 19 or less employees and such firms employed 16,395,868 persons.¹⁴ This constitutes 87 percent of the firms in the United States and 25 percent of the employees.

Since it has been estimated that businesses having 25 or fewer employees hire more than *half* of the illegal immigrants from Mexico,¹⁵ it can be easily seen that if some of those businesses respond to the Carter plan by discriminating against Chicanos, and they are not prohibited to do so by the Civil Rights of 1964 if they employ 15 persons or less, there will be a significant reduction in the number of jobs that are available to Chicanos.

Another failing of the Carter plan is that its employer sanctions might result in employment discrimination against the very same illegal aliens whose status is adjusted to permanent or temporary residence. The Carter plan did not distinguish between discrimination against Chicanos and discrimination against legal Mexican aliens. It should have because while Chicanos are protected by the Civil Rights Act of 1964, although not fully as previously described, legal Mexican aliens are not.

In *Espinosa v. Farah Mfg. Co.*,¹⁶ the Supreme Court held that although it would be violative of the Civil Rights Act of 1964 for an employer to discriminate against aliens because of race, color, religion, sex, or national origin, such as by hiring aliens of certain ancestry but refusing to hire aliens of other ancestry, nevertheless an employer's refusal to hire any aliens because of lack of American citizenship did not constitute discrimination on the basis of "national origin." In the case at bar, the defendant's policy against hiring aliens did not have the effect of discriminating against persons of Mexican national origin, since more than 96 percent of the employer's work force consisted of American citizens of Mexican origin, and since the applicant had been denied employment because of lack of citizenship,

not because of the country of her origin. Thus the Carter plan, which relies on existing anti-discrimination laws to protect the Chicano and the legal Mexican alien from the probable discriminatory response engendered by the employer sanctions, shortchanges the newly legalized Mexican alien since he falls outside the protections of the Civil Rights Act of 1964 although he would face the same discrimination as his Chicano neighbor.

Legal Mexican aliens are not, however, without protection. The Civil Rights Act of 1866 has been held to cover a Mexican registered resident alien in the U.S. In *Guerra v. Manchester Terminal Corp.*¹⁷ the court held that §1981 "clearly intended for aliens to be protected under the broad aegis of all 'persons'."

Chicanos, likewise fall under the protection of the Civil Rights Act of 1866. In *Sabala v. Western Gillette, Inc.*¹⁸ the court held that "Mexican-Americans who are discriminated against on the basis of their ethnic heritage may sue under §1981." Both of these rulings are lower court opinions and therefore limited in their application but they seem to point in a legally sound direction.

The inclusion of Mexican aliens and Chicanos into the protection offered by §1981 is most significant. Major benefits accrue both to plaintiffs and the public interest in the eradication of discrimination when parties are able to utilize the Civil Rights Act of 1866. Those benefits include broader coverage, there is no exemption for employers of 15 persons or less, and the statute of limitations is not limited to the 300 days of the Civil Rights Act of 1964. There are also less burdensome requirements for the exhaustion of remedies and greater potential remedies.¹⁹

The possibility does exist, however, that the Supreme Court might rule some day that §1981 was intended to apply only to blacks. Thus, Chicanos and legal aliens will be left without statutory recourse to full protection against discrimination employment. The Carter plan should therefore, be amended to include full statutory protection for Chicanos and legal Mexican aliens against employment discrimination by all employers. Such statutory protection should also allow for the recovery of attorney's fees for counsel representing plaintiffs seeking the protection of the law.

IV. CONCLUSION

The illegal Mexican migration to the United States has resulted in judicial and statutory responses that have constrained the constitutional and civil rights of Chicanos. The Supreme Court, in its concern for stopping the flow of illegal immigrants northward, has ruled that it is not a constitutional violation to refer motorists to a secondary inspection location at a permanent border patrol checkpoint even if such referral is based largely on a Mexican appearance and even if such referral lacks any reasonable suspicion. In the words of the dissenting opinion such a policy is "repugnant" and its discriminatory effect will fall upon the Chicano.

The section of the Carter plan which will add 2000 border patrolmen and reorganize the border patrol's resources for greater effectiveness will only multiply the discriminatory incidents if the border patrol's inspection policy is unchanged. The Carter plan should provide in its reorganization of the border patrol a change in the inspection policy which will accord Chicanos the same rights to unfettered passage that is accorded to other non-Mexican looking citizens. It would be ironic if the Carter plan which is intended partly as an act of humanitarianism resulted in persistent acts of discrimination against a substantial portion of the nation's citizenry and against the very recipients of that humanitarianism.

Likewise, the Carter plan which involves sanctions against employers who engage in a pattern or practice of hiring illegal aliens is unbalanced in that it is inadequate in its protection against employment discrimination surely to be suffered by Chicanos and legal Mexican aliens. The Carter plan should include specific statutory protection for Chicanos and legal Mexican aliens against employment discrimination by all employers. Such statutory protection should include authorization for the recovery of attorney's fees for plaintiffs seeking the protection of the law.

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